SOME ORIGINAL AND PECULIAR FEATURES IN THE NEBRASKA CONSTITUTION.[1]

It might seem, at first thought, that a young commonwealth like Nebraska would have no original or peculiar features in its fundamental law. Constitution making had been in progress, even in America, for about a century before the first convention assembled for that purpose within the present boundaries of Nebraska. Moreover, the political ideas which form the subject-matter of most constitutions had been wrought out through a long period of European civic development before the New World history had even begun. One might expect to find, therefore, that the Nebraska constitution is but a copy of similar instruments which preceded it. In reality, however, the fundamental law of this state contains a number of important provisions which appear to be original and which afford an interesting field for investigation by the jurist and the student of legal systems.

The bill of rights is the oldest part of existing constitutions. Many of its clauses are exact reproductions of the instrument of the same name which marked the successful issue of the English revolution. Still other provisions find their origin as far back as Magna Charta. In this part of our constitution we might least expect to find originality; and yet our bill of rights provides its own rule of construction by means of a clause which is different from every other state constitution which I have found except one.

It is commonly said that the canons of construction for federal and state constitutions are directly opposite,—that the federal instrument is a grant and confers no powers not expressly mentioned, while a state constitution is a limitation and passes all power not expressly retained.[2] To this doctrine, so well established elsewhere, our bill of rights affords an exception. For the last clause of this part of our fundamental law is as follows: "This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all power not herein delegated, remains with the people. (Art. i, Sec. 26.)

The significance of this provision has, I think, been generally overlooked. Literally applied it would require the same rule of strict construction for both our federal and state constitutions; it would give the legislature, as well as the other branches of the state government, no implied powers while every legislative act would need support in some express clause of the constitution. I have not observed, however, that any such rule has been followed in practice. The construc-

[1] A paper read before the Nebraska State Historical Society at its annual meeting, January, 1899.

[2] See the article "Constitutional Law," 6 Am. & Eng. Encyclopedia of Law (second edition), pp. 933, 934.

tion given to our fundamental law by the courts appears not to differ from that awarded to state constitutions generally,[1] and I have known of arguments at the bar wherein it was either assumed or asserted that our constitution is a limitation and not a grant. Still it seems unlikely that so plain a provision will always escape notice and it may yet work surprising changes in constitutional interpretation.

I have said that this clause has been found in the constitution of no other state except one. The exception is North Carolina whose fundamental law contains an exactly similar provision which has been recognized and applied by its courts.[2] The relation between these two constitutions and the extent to which one may have borrowed from the other offers an interesting problem for the historian.

Another peculiar provision of our bill of rights is that which guarantees the right of appeal. It is as follows: "The right to be heard in all civil cases in the court of last resort, by appeal or otherwise, shall not be denied." (Art. i, Sec. 24.) The guaranty of the right to be heard in courts of *original* jurisdiction is found in almost, if not quite, every American constitution and is as old as Magna Charta. But the right to be heard in an *appellate* court is a different matter and I find no constitution except ours which guarantees it. This provision like the one last noticed would be exceedingly important were it literally applied, for its logical effect is to invalidate all legislation which prevents a hearing in the court of last resort. It might even be true that a literal construction of this clause would invalidate certain statutes which cut off an appeal where a litigant fails to take certain formal steps within a prescribed period. But this clause, like the other is not literally applied. We have e. g. a statute[3] which entirely forbids an appeal from an inferior court in cases tried to a jury where the amount claimed does not exceed twenty dollars, and this statute has been several times upheld by the courts.[4] In practice, therefore, this constitutional provision seems not to have materially affected the legislation of this state. It has, however, influenced the course of judicial legislation, at least one decision having been overruled on the strength of the constitutional guaranty.[5]

A provision submitted separately from the constitution itself, but nevertheless forming a part of that instrument, is that which authorizes the legislature to enable the voters to express their choice of candidates for the office of United States Senator. At the time of its

[1] See Magneau *v.* Fremont, 30 Neb. 843, 852 and cases there cited.
[2] People *v.* McKee, 68 N. Car. 429.
[3] Code Civil Proc., Sec. 958.
[4] C. B & C. R. Co. *v.* Headrick, 49 Neb. 286; Moise *v.* Powell, 40 Neb. 671.
[5] Shawang *v.* Love, 15 Neb. 142; overruled in Hurlburt *v.* Palmer, 39 Neb. 188.

adoption it was a unique plan and was welcomed as a step towards popular election of senators. But in practice it has amounted to little. Twice in our political history a popular candidate has received a large vote for the senatorial office—once in 1886, when the late General Van Wyck sought re-election, and again in 1894, when Messrs. Bryan and Thurston were rival candidates. But at no time has the legislature actually provided for a popular ballot upon senatorial candidates, and as the constitutional clause is permissive only and not mandatory or self-acting, the votes which are cast for this purpose are not officially canvassed and are treated as a mere voluntary expression of the electors. Moreover, in no instance has a senatorial contest in this state been determined or even materially affected by the popular vote cast for a particular candidate. Nevertheless this provision has been incorporated into the new constitution of South Carolina, and was probably borrowed from ours, as no other instrument of the kind embodied such a plan. Under more favorable conditions, too, it may yet prove to be the transitional step towards the direct popular choice of United States senators.

Law has been characterized by an eminent Italian jurist as the product of economic conditions.[1] Our state constitution, as the highest expression of local law, illustrates this in several features. Indeed, it may be not inaptly termed a "grasshopper" constitution, for, in 1875, when it was framed, the state was just emerging from the gloom and destitution caused by the insect scourge of the preceding summer. The scrupulous care with which offices were limited and salaries curtailed shows the influence of these conditions on the work of the convention. The highest salary allowed by the constitution is $2,500, and yet even that sum must have seemed a fortune to the impoverished Nebraskan of a quarter of a century ago. The story of how these checks and limitations regarding offices have been evaded through such means as the creation of boards and the appointment of secretaries, is a familiar one and illustrates the inefficacy as well as inexpediency of permanent measures to meet merely temporary conditions.

Our fundamental law was framed at a transitional period in the history of constitution-making in America. The constitutions which preceded it were of the old type containing merely the Bill of Rights, the framework of government and a few other general provisions. Those framed in more recent years are of increasingly widening scope, extending far into the field of general legislation.[2] The Nebraska

[1] Loria, "Economic Basis of the Social Constitution," reviewed in Political Science Quarterly for December, 1893.

[2] See Thorpe, "Recent Constitution Making in the United States," ANNALS OF AMERICAN ACADEMY, vol. 2, p. 145; Eaton, "Recent State Constitutions," 6 Harvard Law Rev., pp. 53, 109.

constitution occupies a position midway between these two types. It has a less extensive scope than those framed during the last decade, but it covers many subjects which would have seemed out of place in the constitutions of the early part of the century. Such are the articles (XI, XII, XIII) relating to railroad and other corporations, provisions of which have been of frequent consideration by the supreme court in recent years.

Perhaps the most effective and at the same time most serious of these peculiar features of our constitution is its unchangeableness. For its own amendment it requires "a majority of the electors voting at the election," [1] and this has been construed by the supreme court to mean a majority of the highest aggregate number of votes cast at the election, whether for candidates or propositions, [2] and not merely a majority of those cast on the amendment. One of the judges wherein this construction is announced frankly recognizes that "taking the past as a criterion by which to foretell the future, it would seem that under the construction adopted, it will be almost, if not quite impossible, to change the present constitution, however meritorious may be the amendment proposed." And this conviction is not confined to the judicial, but is also shared in by the executive branch. Our new governor, in his inaugural message, calls attention to the fact that although proposed amendments are submitted at almost every session of the legislature, yet "in the press of other matters and the excitement of political campaigns, they are lost sight of and fail to receive popular ratification." The justification for this remark will appear when we recall that while our constitution has been in force for almost a quarter of a century, and while at one time (in 1896) as many as twelve propositions of amendments were pending, there is but one instance where a change has been actually effected, and that only through a legislative recount after the proposition had been declared lost by the official canvassers. [3]

It seems to be conceded, then, that our constitution is practically unchangeable by amendment, and if so we find here not only a most peculiar feature, but one of gravest concern to the commonwealth. Doubtless it is important that our fundamental law should be stable and secure, not changed with every wave of popular caprice, and not easily manipulated by designing politicians. [4]

[1] Sec. 1 of Art. XVII (or XV as it appears in the Compiled Statutes).

[2] Tecumseh Nat. Bank *v.* Saunders, 51 Neb. 801; 71 N. W. Rep. 779

[3] This was in 1886, when the provision which now forms Sec. 4 of Art. III was declared adopted in pursuance of Session Laws of 1887, ch. 2.

[4] This idea was emphasized by Governor Dawes in his retiring message of 1887, as a reason for disapproving the plan of calling a constitutional convention.

A remedy for this plight into which our laws have fallen seems to lie in the calling of a constitutional convention, and a general belief that this is the only possible solution is indicated in the fact that both our incoming and retiring governors have recommended that plan to the present legislature. It is gratifying to know that such a course meets the approval of some who speak with authority. Mr. E. L. Godkin, editor of the *Nation*, always conservative and never an optimist, thus characterizes the constitutional convention as a factor in American political development: "Through the hundred years of national existence it has received little but favorable criticism from any quarter. It is still an honor to have a seat in it. The best men in the community are still eager or willing to serve in it, no matter at what cost to health or private affairs. I cannot recall one convention which has incurred either odium or contempt. Time and social changes have often frustrated its expectations, or have shown its provisions for the public welfare to be inadequate or mistaken, but it is very rare indeed to hear its wisdom and integrity questioned. In looking over the list of those who have figured in conventions of the State of New York since the Revolution, one finds the name of nearly every man of weight and prominence; and few lay it down without thinking how happy we should be if we could secure such service for our ordinary legislative bodies." [1]

Who shall say that the creation of such a body at this time would not summon to the service of the state many gifted citizens of whose assistance the state is now deprived because present political conditions fail to attract them? If so the result would tend to quicken and regenerate the not too wholesome civic life of our beloved commonwealth, besides facilitating by the removal of obsolete constitutional barriers, that steady improvement in laws and institutions which is the normal tendency of every free and intelligent people.

CHARLES SUMNER LOBINGIER.

Omaha, Neb.

STREET RAILWAY POLICY IN BERLIN.

The city of Berlin is just now in a transition period, so far as its system of street railway lines is concerned. The development is likely to be of extraordinary interest and will attract the attention of the students of municipal government during the next few years.

It will be remembered that the city of Berlin granted extensive privileges to private corporations many years ago for the construction of

[1] Godkin, "The Decline of Legislatures," *Atlantic Monthly* (1897), Vol. 80, pp. 35, 52.